

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
APPENDIX**

74-1186 B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, :

Appellee, :

-against-

HUMBERTO FLORES, :

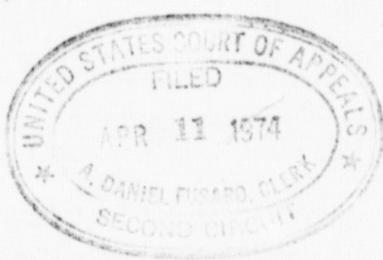
Appellant. :

Docket No. 74-1186

P/S

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
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WILLIAM EPSTEIN,
Of Counsel

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63 JK 002

COSTANTINO, J.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U.S.: Ausa: R. CLARK
vs.	
HUMBERTO FLORES ,	
CARLOS HIDALGO ,	
MIGUEL VERA	

Did import drugs into the U.S.

DATE	PROCEEDINGS
7/19/73	Before JUDD, J. - Indictment filed and Bench Warrants ordered and issued.
7/28/73	Notice of Appearance filed for deft FLORES.
7/28/73	Before COSTANTINO J - Case called - Daft FLORES & counsel present; deft arraigned and enters a plea of not guilty - trial set down for 9-17-73 at 10:00 am. Bail set at \$75.000.00 - deft in custody.
7/29/73	Bench Warrant ret'd and filed. Executed. (FLORES, H.)
7/25/73	Notice of Readiness for Trial filed.
8-3-73	Before COSTANTINO J - Case called - Deft & counsel Mrs. Rosner present - Interpreter present. Motion withdrawn for reduction of bail argued and adjd to 8-6-73. (FLORES)
8/6/73	Before, COSTANTINO, J. - Case called- Deft and atty Mrs. Rosner with interpreter present. Motion argued- Bail reduced to \$50,000.00 Cash Bond
	Deft FLORES

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DATE	PROCEEDINGS
9/4/73	Before COSTANTINO, J. - Case called - Deft present - Court to appoint counsel - Court appoints Nancy Rosner as counsel (FLORES)
9-4-73	By Costantino J - Memorandum and Order filed leave to proceed in forma pauperis is granted (Humberto Flores)
9-17-73	Before COSTANTINO J - Case called - deft Humberto Flores with counsel A. Greco present with interpreter - motion to reduce bail - bail is reduced to \$25,000 surety bail - case set for trial on Oct. 10, 1973.
10-10-73	Before Costantino J - Case called - deft FLORES & counsel Mr. Greco present - trial adjd to Oct. 15, 1973.
10-11-73	Affidavit of JOHN DANIOCEK filed.
10-12-73	Before COSTANTINO J - Case called - deft Humberto Flores & counsel A. Greco present - Hearing held on motion to dismiss the Indictment under Rule 5 - Hearing concluded - Decision Reserved - Trial set for Oct. 15, 1973 at 10:00 am.
10/15/73	Before COSTANTINO, J. - Case called - Deft and atty present - Case adjd to 10/16/73 for trial (FLORES)
10/15/73	By COSTANTINO, J. - Memorandum and Order filed denying deft Flores's motion to dismiss the indictment
10/16/73	Govt's requests to Charge filed (Flores)
10-16-73	Before COSTANTINO J - Case called - deft & attorney A. Greco with interpreter present - Eulalia Greenberg & Daisy Santos) Jury selected and sworn - Trial ordered and BEGUN - Trial continued to Oct. 17, 1973.
10-17-73	Before COSTANTINO J - Case called - deft & atty A. Greco present with interpreter - Trial resumed - Trial continued to Oct. 18, 1973.
10/18/73	Before COSTANTINO, J. - Case called - Trial resumed - Deft and his atty present with the interpreter D. Santos - Trial cont'd to 10/19/73.
10/23/73	Stenographers Transcript dated 10/17/73 and 10/18/73 filed
10/23/73	Voucher for expert services filed
10/19/73	Before COSTANTINO, J. - Case called - Deft and counsel present - Trial resumed - Order of sustenance signed - Jury returns and renders a verdict of guilty on counts 1 and 2 - Jury polled - Jury discharged - Trial concluded - Sentence adjd without date - Bail cont'd in sum of \$25,000.00 (FLORES)
10/19/73	By COSTANTINO, J. - Order of sustenance filed
10/24/73	Voucher for expert services filed
10-25-73	Stenographers transcript filed dated Oct. 19, 1973.
11-13-73	Stenographers transcript filed dated Oct. 12, 1973.
11/23/73	Voucher for expert services filed (HUMBERTO FLORES)
11-30-73	Voucher for Expert Services filed (HUMBERTO FLORES)

DATE	PROCEEDINGS
2-8-74	Before COSTANTINO J - case called - deft/& atty A.Greco present. Interpreter Emil Rodriguez present and sworn - deft sentenced to imprisonment for a period of 8 years on count 1 and 8 years on count 2 to run concurrently pursuant to 18:4208(a)(2) plus special parole term of 5 years.
2-8-74	Judgment & Commitment filed - certified copies to Marshal.
2-8-74	Notice of Appeal filed (no fee) HUMBERTO FLORES.
2-8-74	Docket entries and duplicate of Notice of Appeal mailed to C of A
2-11-74	Voucher for compensation of counsel filed (FLORES)
2-11-74	Copy of Judgment & Commitment retd and filed - deft Flores del. to Federal Detention Headquarters.
3-6-74	Order received from Court of Appeals and filed that record be docketed on or before March 8, 1974 (FLORES)

A TRUE COPY

ATTEST

DATED 3/1/1974

LEWIS ORGEL

CLERK

BY *Lewis Orgel* DEPUTY CLERK

1a

EJB:RLC:mc
F.#733,310

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA

- against -

HUMBERTO FLORES, CARLOS
HIDALGO and MIGUEL VERA,

Defendant.

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.

----- X -----

THE GRAND JURY CHARGES:

STAR JUN 19 1973 STAR

TIME AM
COUNT ONE

On or about the 25th day of February 1972,
at Guayaquil, Ecuador, the defendant CARLOS HIDALGO
did knowingly and intentionally distribute approximately
2.8 kilograms of cocaine hydrochloride, a Schedule II
narcotic drug controlled substance, at the time intending
that such cocaine hydrochloride would be unlawfully
imported into the United States. (Title 21, United States
Code, Section 959(1) and Section 960(a)(3))

73 CR 602

INDICTMENT

Crim. No.
(T. 21, U.S.C., §952(a),
§959(1)(2), §960(a)(1)(3),
and §963; T. 18, U.S.C.,
§2)

COUNT TWO

15th Count

On or about the 28th day of September 1972, within the Eastern District of New York, the defendant HUMBERTO FLORES and the defendant MIGUEL VERA did knowingly and intentionally import into the United States from Santiago, Chile, approximately 2.2 kilograms of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Section 952(a) and Section 960(a)(1); Title 18, United States Code, Section 2)

COUNT THREE

On or about the 28th day of September 1972, at Santiago, Chile, the defendant MIGUEL VERA did knowingly and intentionally distribute approximately 2.2 kilograms of cocaine hydrochloride, a Schedule II narcotic drug controlled substance, at the time knowing that such cocaine

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hydrochloride would be unlawfully imported into the United States. (Title 21, United States Code, Section 959(2) and Section 960(a)(3))

COUNT FOUR

2d Count

On or about and between the 1st day of September 1971 and the day of the filing of this indictment, both dates being approximate, within the Eastern District of New York and elsewhere, the defendant HUMBERTO FLORES, the defendant CARLOS HIDALGO and the defendant MIGUEL VERA did combine, conspire and confederate among themselves and together with other persons, to commit offenses in violation of Title 21, United States Code, Section 952(a) by conspiring to knowingly and intentionally import into the United States from Ecuador and Chile and other places outside the United States, quantities of cocaine hydrochloride, a Schedule II narcotic drug controlled substance.

In furtherance of said conspiracy and toward the accomplishment of the objectives thereof, the defendants committed various overt acts including but not limited to the following:

O V E R T A C T S

1. On or about February 13, 1972, the defendant CARLOS HIDALGO traveled from John F. Kennedy International Airport, Queens, New York, within the Eastern District of New York, to Guayaquil, Ecuador.

2. On or about September 28, 1972 at Santiago, Chile, the defendant MIGUEL VERA went to the Valparaiso Hotel, Santiago, Chile.

3. On or about September 28, 1972, the defendant HUMBERTO FLORES went to the International Arrivals Building

-3-

at John F. Kennedy International Airport, Queens, New York,
within the Eastern District of New York. (Title 21, United
States Code, Section 963)

A TRUE BILL.

Patricia R. Kessner
FOREMAN

Robert A. Nardone, Jr. Esq.
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

1
2 THE COURT: I will now give you the
3 Charge of the Court.

4 Madam Forelady and ladies and gentlemen
5 of the jury:

6 We now come to the final stage of the
7 proceedings. The Court will now charge you on
8 the law to be applied to the facts in the case.
9 As you may recall, I initially gave you a pre-
10 charge as to the manner in which the case would
11 be presented to you. I told you that most of
12 the evidence in the case would come in the form
13 of the testimony of witnesses, and that you
14 were to pay special attention to the manner in
15 which the witnesses testified.

16 I believe I also instructed you that you
17 would be the judges of the facts in the case,
18 that being your sole province; and that your
19 recollection of the facts after having heard all
20 of the evidence in the case -- the testimony of
21 witnesses and the documentary proof -- was to
22 control the determination of the issues.

23 Likewise at that time I told you that I
24 would be the Judge of the law. This has not
25 changed at this stage of the proceedings. I will

2 not review the facts in this case for you
3 because I am certain that with summation by the
4 attorneys there is no need for the Court to
5 review the facts. In any event, if you find
6 that there is some fact in the case that you
7 may have forgotten or don't recollect, or you
8 can't agree with each other in your deliberations,
9 you can have it read back from the record, and
10 that will, I am sure, refresh your memory.

11 In any event, I am the Judge of the law.
12 You must accept what I say to be the law in this
13 case.

14 Now, the attorneys have been permitted
15 by the Court and by the rules to make opening
16 statements and summations to you. Under no
17 circumstances are the statements that they have
18 made by way of opening or by way of summation
19 be taken as evidence. However, the Court and
20 the law does permit you to take the arguments that
21 they have proffered before you and weigh those
22 arguments. And if you agree with what they have
23 said on either side of the tapes, you may use
24 those arguments in your deliberations and in
25 discussing the case with each other, and try to

2 convince one another as to what the final
3 determination shall be with reference to the
4 deliberations at hand.

5 If you feel that the arguments are not
6 commensurate with the testimony and the proof
7 in the case you may disregard them. They are
8 not evidence. You need not weigh them. However,
9 there are times when the arguments of the
10 attorneys will give you an insight as to something
11 you may have missed, and you may discuss that
12 portion of it if you so desire.

13 Now, of course, I also said to you that
14 during the trial the Court will be the judge of
15 the law. Likewise, as to motions which at times
16 we had at a side bar, as you may recall. That
17 was not for the purpose of keeping any of the
18 proof from you, but were matters of law that
19 were discussed between the attorneys and the
20 Court itself and should not have come before you.
21 In any event, if you feel that you have discovered
22 by some stretch of your imagination what the
23 Court thinks as to either some of the testimony
24 or the case itself, you should that from your
25 mind because I tell you here and now I have come

2 to no conclusion in this case nor have I
3 indicated to you in any way whatsoever what my
4 feeling is with reference to the facts in the
5 case or with reference to the guilt or
6 innocence of the defendant. That is your
7 province and your job. You should not try to
8 weigh what you believe the Court's impression
9 may be.

10 You must understand that the lawyers who
11 appear before you are advocates. They are advocating
12 the best case they can for the people they
13 represent and they have a right to exercise as
14 much forcefulness as they desire in thier
15 questioning or otherwise in presenting their
16 case in an attempt to convince you of the innocence
17 of their client or on the side of the Government
18 of the guilt of the defendant. I say this
19 because this is all within the framework of
20 the ordinary trial.

21 Of course, you know by this time that this
22 case has come before you by way of an indictment
23 presented by a Grand Jury sitting in the Eastern
24 District. That indictment charges the defendant
25 with the counts I shall now read to you. Remember,

2 the indictment is merely an accusation, merely
3 a piece of paper. It is not evidence and it is
4 not proof of anything.

5 The first count of the indictment is as
6 follows:

7 ~ On or about the 23th day of September, 1972,
8 within the Eastern District of New York, the
9 defendant Humberto Flores and the defendant
10 Miguel Vera knowingly and intentionally import
11 into the United States from Santiago, Chile,
12 approximately 2.2 kilograms of cocaine hydro-
13 chloride, a schedule 2 narcotics controlled
14 substance. Title 21, United States Code,
15 Section 952(a) and Section 960(a)(1), Title 18,
16 United States Cose, Section 2.

17 I will now read to you the section of
18 law that applies to this count of the indictment:

19 21 United States Code, Section 952(a).
20 It shall be unlawful to import into the customs
21 territory of the United States from anyplace
22 outside thereof, but within the United States,
23 or to import into the United States from
24 anyplace outside thereof, any controlled substance
25 or narcotic drug. Cocaine hydrochloride is a

2 controlled substance pursuant to Section 312
3 Title 21 of the United States Code.

4 Section 960(a)(1) of Title 21 of the
5 United States Code sets out the punishment for
6 a violation of Section 952(a). The jury should
7 not concern itself with the sentence; that is
8 the exclusive province of the Court.

9 Section 2 of 21 United States Code,
10 principals, subdivision A:

11 Whoever commits an offense against the
12 United States or aids, abets, counsels, commands,
13 induces or procures its commission, is punishable
14 as a principal.

15 B: Whoever willfully causes an act
16 to be done which if directly performed by him
17 or another would be an offense against the
18 United States, is punishable as a principal.

19 The second count of the indictment is as
20 follows:

21 On or about and between the first day
22 of September, 1971 and the day of the filing of
23 this indictment, both dates being approximate,
24 within the Eastern District of New York and
25 elsewhere, the defendant Humberto Flores, the

2 defendant Carlos Hidalgo and the defendant
3 Miguel Vera did combine, conspire and confederate
4 among themselves and together with other persons
5 to, to commit offenses in violation of Title 21,
6 United States Code, Section 952(a) by conspiring
7 to knowingly and intentionally import into the
8 United States from Ecuador and Chile and other
9 places outside the United States, quantities of
10 cocaine hydrochloride, a Schedule 2 narcotic drug
11 controlled substance.

12 In furthererance of such conspiracy and
13 toward the accomplishment of the objectives thereof,
14 the defendants committed various overt acts
15 including but not limited to the following:

16 One, on or about February 13, 1972 the
17 defendant Carlos Hidalgo travelled from John F. Kennedy
18 International Airport, Queens, New York within
19 the Eastern District of New York to Guayaquil,
20 Ecuador.

21 Two, on or about September 28, 1972 at
22 Santiago, Chile, the defendant Miguel Vera went
23 to the Valparaiso Hotel, Santiago, Chile.

24 Three, on or about September 28, 1972, the
25 defendant Humberto Flores went to the International

2 Arrivals Building at John F. Kennedy International
3 Airport, Queens, New York within the Eastern
4 District of New York. Title 21 United States
5 Code, Section 963.

6 I will read to you the section of law
7 that applies to this count of the indictment.

8 Section 963 of 21 United States Code reads:

9 Any person who conspires to commit any
10 offense defined in subchapter 2 of the Drug Abuse
11 Prevention Control Act is guilty of a crime.

12 The essential elements of the first count
13 of the indictment, all of which the Government
14 must prove beyond a reasonable doubt or else
15 you must acquit the defendant on the first count,
16 are as follows:

17 First, that the defendant brought a
18 quantity of cocaine into United States from abroad;
19 and:

20 Second, the defendant knew that the
21 substance he was bringing to the United States
22 was cocaine, or some other illicit drug; and:

23 Third, that the defendant understood that
24 he was acting illegally.

25 If the Government proves each of these

2 three essential elements beyond a reasonable
3 doubt, then you must find the defendant guilty
4 on the first count. If the Government fails to
5 prove any one or more of the three essential
6 elements, then you must acquit the defendant.

7 The first count of the indictment also
8 charges that the defendant was an aider and
9 abettor. In order to aid and abet another to
10 commit a crime it is necessary that the accused
11 willfully associated himself in some way with
12 the criminal venture and willfully participate
13 in it as he would in something he wishes to bring
14 about; that is to say that he willfully seeks
15 by some act or omission of his to make the
16 criminal venture succeed.

17 An act of omission is "willfully" done
18 if done voluntarily and intentionally and with
19 the specific intent to do something the law
20 forbids, or with specific intent to fail to do
21 something the law requires to be done; that is
22 to say with that purpose either to obey or to
23 disregard the law.

24 You of course may not find the defendant
25 guilty unless you find beyond a reasonable doubt

that every element of the offense as defined in these instructions was committed by some person or persons, and that the defendant participated in its commission.

Mere presence at the scene of the crime and knowledge that a crime is being committed are not sufficient to establish that the defendant aided and abetted the crime, unless you find that beyond a reasonable doubt that the defendant was a participant and not merely a knowing conspirator.

The second count of the indictment charges the defendant with conspiring to commit the offense charged in the first count. Section 963 provides that: "Any person who conspires to commit any offense defined in subchapter 2 of the Drug Abuse Prevention Control Act is guilty of a crime."

(continued on next page)

1
2 A conspiracy is a combination of two or
3 more persons, by concerted acts, to accomplish
4 some unlawful purpose, or to accomplish some
5 lawful purpose by unlawful means. So, a conspiracy
6 is a kind of a "partnership in criminal purposes",
7 in which each member becomes the agent of every
8 other member. The ^{gist} of the offense, is a
9 combination or agreement to disobey, or to dis-
10 regard, the law.

11 Mere similarity of conduct among various
12 persons, and the fact that they have associated
13 with each other, and they have assembled together
14 and discussed common aims and interests, does not
15 necessarily establish proof of the essence of a
16 conspiracy. However, the evidence in the case
17 need not show that the members entered into any
18 express or formal agreement, or that they directly,
19 by words spoken or in writing, stated between
20 themselves what their object or purpose was to be,
21 or the details thereof, or the means by which
22 the subject or purpose was to be accomplished.
23 What the evidence in the case must show beyond
24 a reasonable doubt, in order to establish proof
25 that a conspiracy existed, is that the members

2 in some way or manner, or through some contrivance,
3 positively or tacitly came to a mutual under-
4 standing to try accomplish a common and unlawful
5 plan.

6 The evidence in the case need not establish
7 that all the means or methods set forth in the
8 indictment were agreed upon to carry out the
9 alleged conspiracy; nor that all means or methods,
10 which were agreed upon, were actually used or
11 put into operation; nor that all of the persons
12 charged to have been members of the alleged
13 conspiracy were such. What the evidence in the
14 case must establish beyond a reasonable doubt is
15 that the alleged conspiracy was knowingly formed,
16 and that one or more of the means or methods
17 described in the indictment were agreed upon to
18 be used, in an effort to effect or accomplish some
19 object or purpose of the conspiracy, as charged
20 in the indictment; and that two or more persons,
21 including one or more of the accused, were
22 knowingly members of the conspiracy, as charged
23 in the indictment.

24 One may become a member of a conspiracy
25 without full knowledge of all the details of the

1
2 conspiracy. On the other hand, a person who has
3 no knowledge of a conspiracy, but happens to act
4 in a way which furthers some object or purpose
5 of the conspiracy, does not thereby become a
6 conspirator.

7 Before the jury may find that a defendant,
8 or any other person, has become a member of the
9 conspiracy, the evidence in the case must show
10 beyond a reasonable doubt that the conspiracy
11 was knowingly formed, and that the defendant, or
12 other person who is claimed to have been a member,
13 willfully participated in the unlawful plan,
14 with the intent to advance or further some object
15 or purpose of the conspiracy.

16 To act or participate willfully means to
17 act or participate voluntarily and intentionally,
18 and with the specific intent to do something the
19 law forbids or with specific intent to fail to
20 do something the law requires to be done, that
21 is to say, to act or participate with the bad
22 purpose either to disobey or to disregard the law.
23 So, if a defendant, or any other person, with
24 understanding of the unlawful character of a plan,
25 knowingly encourages, advises or assists, for the

2 purpose of furthering the undertaking or scheme,
3 thereby becoming a willfull participant -- a
4 conspirator.

5 One who willfully joins an existing
6 conspiracy is charged with the same responsibility
7 as if he had been one of the originators or
8 instigators of the conspiracy. In determining
9 whether a conspiracy existed, the jury should
10 consider the actions and declarations of all of
11 the alleged participants. However, in determining
12 whether a particular defendant was a member of
13 the conspiracy, if any, the jury should consider
14 only his acts and statements. He cannot be
15 bound by the acts or declarations of other
16 participants until it is established that a
17 conspiracy existed, and that he was one of the
18 members.

19 Four essential elements are required to
20 be proved in order to establish the offense of
21 conspiracy charged in the indictment:

22 First, that the conspiracy described in
23 the indictment was willfully formed and was
24 existing at or about the time alleged;

25 Second, that the accused willfully became

2 a member of the conspiracy;

3 Third, that one of the conspirators there-
4 after knowingly committed one of the overt acts
5 charged in the indictment, at or about the time
6 and place alleged;

7 Fourth, that such overt act was knowingly
8 done in furtherance of some object or purpose
9 of the conspiracy, as charged.

10 If the jury should find beyond a reasonable
11 doubt from the evidence in the case that the
12 existence of the conspiracy charged in the
13 indictment has been proved, and that during the
14 existence of the conspiracy one of the overt acts
15 alleged was knowingly done by one of the
16 conspirators in furtherance of some object or
17 purpose of the conspiracy, then proof of the
18 conspiracy offense charged is complete; and it
19 is complete as to every person found by the jury
20 to have been willfully a member of the conspiracy
21 at the time the overt act was committed, regard-
22 less of which of the conspirators did the overt
23 act.

24 Again, the overt acts charged in this
25 indictment are:

2 One, on or about February 13, 1972 the
3 defendant Carlos Hidalgo travelled from John F.
4 Kennedy International Airport, Queens, New York,
5 within the Eastern District of New York to
6 Guayaquil, Ecuador.

7 Two, on or about September 28, 1972 at
8 Santiago, Chile the defendant Miguel Vera went
9 to the Valparaiso Hotel, Santiago, Chile.

10 Three, on or about September 28, 1972 the
11 defendant Humberto Flores went to the International
12 Arrivals Building at John F. Kennedy International
13 Airport, Queens, New York, within the Eastern
14 District of New York.

15 Stated before, the burden is always upon
16 the prosecution to prove beyond a reasonable
17 doubt every essential element of the crime
18 charged. The law never imposes upon a defendant
19 in a criminal case the burden or duty of calling
20 any witnesses or producing any evidence.

21 Whenever it appears beyond a reasonable
22 doubt from the evidence in the case that a
23 conspiracy existed, and that a defendant was one
24 of the members, then the statements thereafter
25 knowingly made the acts thereafter knowingly

2 done, by any person likewise known to be a member,
3 may be considered by the jury as evidence in the
4 case as to the defendant found to have been a
5 member, even though the statements and acts may
6 have occurred in the absence and without the
7 knowledge of the defendant provided such statements
8 and acts were knowingly made and done during the
9 continuance of such conspiracy, and furtherance
10 of some object or purpose of the conspiracy.

11 Otherwise, any admission or incriminatory
12 statement made or act done outside of court, by
13 one person, may not be considered as evidence
14 against any person who was not present and did not
15 hear the statement made, or see the act done.

16 Therefore, statements of any conspirator,
17 which are not in furtherance of the conspiracy,
18 or made before its existence, or after its
19 determination, may be considered as evidence
20 only against the person making them.

21 Now, there is in any case, and as in this
22 one, two types of evidence from which a jury
23 may properly find a defendant guilty of a crime.
24 One is direct evidence such as the testimony of
25 an eye witness. The other is circumstantial

2 evidence which is proof of a chain of facts
3 and circumstances pointing to the commission of
4 the offense.

5 As a general rule, the law makes no
6 distinction between direct and circumstantial
7 evidence, but simply requires that before convicting
8 the defendant the jury must be satisfied that
9 the defendant's guilt beyond a reasonable doubt
10 from all the evidence in the case. I will
11 describe to you a little later what is meant by
12 "beyond a reasonable doubt."

13 A defendant is presumed innocent of the
14 crime. Thus, the defendant although accused
15 begins the trial with a clean slate and with no
16 evidence against him, and the law permits nothing
17 but legal evidence to be presented before a jury
18 to be considered in support of any charge against
19 the accused, so that the presumption of innocence
20 alone is sufficient to acquit a defendant unless
21 you, the jury, are satisfied beyond a reasonable
22 doubt of the defendant's guilt after careful and
23 impartial consideration of all the evidence in
24 the case.

25 It is not required that the Government prove

2 guilt beyond all possible doubt. The test is
3 one of reasonable doubt, and reasonable doubt is
4 based upon reason and common sense, the kind of
5 doubt that would make a reasonable person hesitate
6 to act. Proof beyond a reasonable doubt must,
7 therefore, be proof of such a convincing character
8 that you would be willing to rely an act upon it
9 unhesitatingly in the most important of your own
10 affairs.

11 You, the jury, will remember that a defendant
12 is never to be convicted on mere suspicion or
13 conjecture. The burden is always upon the
14 prosecution to prove guilt beyond a reasonable
15 doubt. This burden never shifts to a defendant.
16 The Court never imposes upon a defendant in a
17 criminal case the burden or duty of calling any
18 witnesses or producing any evidence.

19 A reasonable doubt exists whenever, after
20 careful and impartial consideration of all the
21 evidence in the case, the jurors do not feel
22 convinced to a moral certainty that a defendant
23 is guilty of the charge. So, if the jury views
24 the evidence in the case as reasonably permitting
25 either of two conclusions, one of innocence, the

2 other of guilt, you, the jury, should, of course,
3 adopt the conclusion of innocence.

4 I have said that the defendant may be
5 proven guilty either by direct or circumstantial
6 evidence. I have said that direct evidence is
7 the testimony of one who asserts actual knowledge
8 of a fact, such as an eye witness. Also circumstantial
9 evidence is proof of a chain of facts and
10 circumstances indicating the guilt or innocence
11 of a defendant. You, the jury, may make common
12 sense inferences from the proven facts.

13 It is not necessary that all inferences
14 drawn from the facts in evidence be consistent
15 only with guilt and inconsistent with every
16 reasonable hypothesis of innocence or that there
17 must be no reasonable doubt as to each chain of
18 proof. The test is one of reasonable doubt and
19 should be based upon all the evidence, the testimony
20 of the witnesses, the documents offered into
21 evidence and the reasonable inferences which can
22 be drawn from the proven facts.

23 An inference is a deduction or conclusion
24 which reason or common sense lead the jury to
25 draw from the facts which have been proved. You

2 are to consider only the evidence in the case.
3 But in your consideration of the evidence you are
4 not limited to the bald statements of the witnesses.
5 On the contrary, you are permitted to draw, from
6 the facts which you find have been proved, such
7 reasonable inferences as seem justified in the
8 light of your own experience.

9 As I stated before, the law never imposes
10 upon a defendant in a criminal case the burden or
11 duty of calling any witnesses or producing any
12 evidence.

13 The crimes charged in this case are serious
14 crimes which require proof of specific intent
15 before the defendant can be convicted. Specific
16 intent, as the term implies, means more than the
17 general intent to commit the act. To establish
18 specific intent, the Government must prove that
19 the defendant knowingly did an act which the law
20 forbids, purposely intending to violate the law.
21 Such intent may be determined from all the facts
22 and circumstances surrounding the case.

23 Intent ordinarily may not be proved
24 directly, because there is no way of fathoming
25 or scrutinizing the operations of the human mind.

2 But you may infer the defendant's intent from
3 the surrounding circumstances. You may consider
4 any statement made and done or omitted by the
5 defendant, and all of the facts and circumstances
6 in evidence which indicate his state of mind. It
7 is ordinarily reasonable to infer that a person
8 intends the natural and probable consequences
9 of acts normally done or knowingly omitted.

10 You as jurors are the sole judges of the
11 credibility of the witnesses and the weight their
12 testimony deserves, and it goes without saying
13 that you should scrutinize all the testimony
14 given, the circumstances under which each witness
15 has testified, and every matter in evidence which
16 tends to show whether a witness is worthy of
17 belief. Consider each witness' intelligence,
18 motive and state of mind, and his demeanor and
19 manner while on the stand. Consider the witness'
20 ability to observe the matters as to which he
21 has testified, and whether he impresses you as
22 having an accurate recollection of these matters.
23 Consider also any relation each witness may bear
24 to either side of the case; the manner in which
25 each witness might be affected by the verdict;

2 and the extent to which, at all, each witness
3 is either supported or contradicted by other
4 evidence in the case.

5 Inconsistencies or discrepancies in the
6 testimony of a witness, or between the testimony
7 of different witnesses may or may not cause the
8 jury to discredit such testimony. Two or more
9 persons witnessing an incident or a transaction
10 may see or hear differently; and innocent mis-
11 recollection, like failure of recollection, is
12 not an uncommon experience.

13 In weighing the affect of a discrepancy,
14 always consider whether it pertains to a matter
15 of importance or an unimportant detail, and
16 whether the discrepancy result from innocent
17 error or intentional falsehood.

18 After making your own judgment, you will
19 give the testimony of each witness such credibility,
20 if any, as you may think it deserves. Another
21 test that you can use in determining the truth-
22 fulness or credibility of a witness is to use your
23 own good common sense in addition to these
24 essentials that I have given you. You can use
25 your good common sense as you do in your everyday

2 experience where you must make important decisions
3 based upon what others tell you. When you decide
4 to either accept or ignore the statements of others
5 you use your common sense. You good judgment
6 will say to you somehow or other that whatever
7 they say does not appear to be truthful, that
8 somehow or other you just do not believe what
9 they have said. That is your ability to reason,
10 your ability to determine the truthfulness of
11 the person you are speaking with. Likewise,
12 your common sense should be used to determine
13 the weight to be given the testimony of a witness.
14 You take that good common sense into the jury room,
15 you do not leave it outside. In addition to
16 what I have said, use your common sense as a
17 test and exercise your good judgment and in
18 determining whether or not this defendant is guilty
19 of the crimes charged. It is for you to determine
20 whether the witnesses in this case have testified
21 truthfully, whether or not they have an interest
22 in the case, what that interest may be and how
23 great it is and whether or not they have told you
24 falsehoods. That is all for you to determine.

25 The testimony of an informer who provides

2 evidence against a defendant for pay, or for
3 immunity from punishment, or for personal advantage
4 or vindication, must be examined and weighed by
5 the jury with greater care than the testimony
6 of an ordinary witness. The jury must determine
7 whether the informer's testimony has been
8 affected by interest or by prejudice against the
9 defendant.

10 An accomplice is one who unites with
11 another person in the commission of a crime,
12 voluntarily and with common intent. An
13 accomplice does not become incompetent as a
14 witness because of participation in the crimes
15 charged. On the contrary, the testimony of an
16 accomplice alone, if believed by the jury, may
17 be a sufficient way to sustain a verdict of guilty,
18 even though not corroborated or supported by
19 other evidence. However, the jury should keep
20 in mind that such testimony is always to be
21 received with caution and weighed with great care.
22 You should never convict a person upon the un-
23 supported testimony of an alleged accomplice,
24 unless you believe that unsupported testimony
25 beyond a reasonable doubt.

(continued on next page)

Evidence that at some time a witness, other than the accused, has said or done something or has failed to say or do something which is inconsistent with the witness' testimony at the trial, may be considered by the jury for the sole purpose of judging the credibility of the witness, but may never be considered as evidence or proof of the truth of any such statement.

10 Every witness' testimony must be weighed as
11 to its truthfulness. If you find any witness lied
12 as to any material facts in the case -- material
13 facts as I said before is the fact that goes to the
14 substance of the case -- then the law gives you
15 certain privileges. One of those privileges is that
16 you have the right to disregard the entire testimony
17 of that witness. If you find, however, that you can
18 sift through that testimony and determine which of
19 the testimony is true and which is false, then the
20 law allows you to take the portions which were true
21 and weigh it and disregard those portions which
22 were false. That again is within your prerogative.

23 The weight of the evidence is not necessarily
24 determined by the number of witnesses testifying on
25 either side. You should consider all the facts and

2 circumstances in evidence to determine which of
3 the witnesses are worthy of greater credence.

4 You may find that the testimony of a smaller
5 number of witnesses on one side is more credible
6 than the testimony of a greater number of wit-
7 nesses on the other.

8 You are not obliged to accept testimony,
9 even though the testimony is uncontradicted and
10 the witness is not impeached. You may decide be-
11 cause of the witness' bearing and demeanor or
12 because of the inherent improbability of this
13 testimony or for other reasons suspicious to you
14 that such testimony is not worthy of belief.

23 There is nothing peculiarly different in
24 the way a jury should consider the evidence in a
25 case from that in which all reasonable persons treat

2 any question depending upon the evidence pre-
3 sented to them. You are expected to use your
4 good sense; consider the evidence in the case
5 for only those purposes for which it has been
6 admitted, and give it a reasonable and fair
7 construction, in the light of your common know-
8 ledge of the natural tendencies and inclinations
9 of human beings.

10 If the accused be proved guilty beyond a
11 reasonable doubt, say so. If not so proved guilty,
12 say so.

13 Keep constantly in mind that it would be
14 a violation of your sworn duty to base a verdict
15 of guilty upon anything other than the evidence
16 in the case, and remember as well that the law
17 never imposes upon a defendant in a criminal case
18 the burden or duty of calling any witnesses or
19 producing any evidence.

20 If any reference by the Court or by counsel
21 to matters of evidence does not coincide with your
22 own recollection, it is your recollection which
23 should control during your deliberations.

24 The punishment provided by law for the
25 offenses charged in the indictment is a matter

2 exclusively within the province of the Court and
3 should never be considered by the jury in any
4 way in arriving at impartial verdict as to the
5 guilt or innocence of the accused.

6 You, Madam Forelady, will preside over the
7 deliberations of the jury and she will be your
8 spokesman here in Court. When twelve of you have
9 arrived at a verdict, you will announce that as
10 the verdict in the case. The form of verdict will
11 be, if you should find the defendant is not guilty
12 of either count, count 1 or count 2, "We the jury
13 find the defendant not guilty."

14 (Continued on next page.)

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1 Charge of Court.

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If you should find the defendant guilty of one of the counts, you may announce that we find the defendant not guilty of whichever count you find him not guilty, and then you may announce which count you do find him guilty of, and that would be "We the jury find him not guilty on count 1 or count 2, whichever of the two it may be, and find him guilty on count 1 or count 2, whichever it may be."

If you should find him guilty on both counts, then the form of your verdict should be "We the jury find the defendant guilty."

If you have any problems with the recollection of the facts in the case, you may ask the Court to have the Court reporter have those statements read back to you, the questions and answers. You will be entitled to have the exhibits brought into the jury room, with the exception of the cocaine which will not be brought into the jury room, but has been exhibited to you in the Courtroom here.

That is the Court's charge.

Come to the sidebar.

(Sidebar.)

THE COURT: Any exceptions?

2 MR. CLAREY: The only problem I have, I
3 don't believe we have to prove the overt acts
4 actually charged. Even ones that are not charged,
5 if we prove --

6 THE COURT: Any overt act.

7 MR. CLAREY: I was not positive.

8 THE COURT: I charged any overt act.

9 MR. CLAREY: I don't have any exception
10 other than that, if that is correct.

11 MR. GRECO: I think you covered everything.

12 Request number 2, that if they were induced
13 to testify by any promise --

14 THE COURT: I gave that as a form of the
15 charge. These are all federal charges. You have
16 state charges.

17 (In open Court.)

18 THE COURT: There is only one addition. I
19 know I charged it, but, in any event, the overt acts
20 may not only be the ones that I read to you, but
21 any overt act that you may have heard by way of
22 testimony.

23 The two alternates now will be excused with
24 the thanks of the Court and the balance will go
25 into the jury room to begin your deliberations.



1a
EJB:RLC:mc
F.#733,310

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA

AFFIDAVIT

- against -

73 CR 602

HUMBERTO FLORES, ET AL.,

Defendants.

----- X

STATE OF NEW YORK)

COUNTY OF KINGS }

ROBERT L. CLAREY, being duly sworn, deposes and says:

(1) I am an Assistant United States Attorney for the Eastern District of New York, having been sworn into that position on April 19, 1971.

(2) During June of 1972 I interviewed Special Agent John Daniocek then of the United States Customs Agency Service concerning the feasibility of prosecuting a cocaine smuggling conspiracy case involving as principals the defendant Humberto Flores and several others. My opinion at that time was that, while the case was potentially prosecutable, there was insufficient evidence on which to base an indictment. It was agreed that Agent Daniocek would continue his investigation and we would hope for a further break in the case. On July 6, 1972 the testimony of one witness was presented to the Grand Jury but no indictment was requested.

(3) On September 28, 1972, the morning after the defendant Humberto Flores' arrest, I was informed by Agent Daniоcek of the facts surrounding the arrest, ie that Flores was undoubtedly the intended recipient of a shipment of cocaine carried by a courier named Raimundo Canas, also known as Rolando Sanchez. Although no actual delivery was made to Flores I felt that in light of the other evidence against him that there might be enough to indict and that at any rate there

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was certainly sufficient evidence upon which to base a complaint and upon which to hold Flores pending reassessment of the entire case.

(4) On September 29, 1972 the defendant Flores was confined in lieu of bail of \$150,000 surety and a hearing was scheduled before the United States Magistrate for October 10, 1972.

(5) During the period from September 29, 1972 until October 10, 1972 your deponent was engaged full time, including weekends, in the preparation of another cocaine smuggling conspiracy case (United States v. Yepes - 72 CR 600) the trial of which began before the Honorable Joseph C. Zavatt, United States District Judge, Eastern District of New York in Westbury on October 11, 1972. Consequently this case (72 M 1842) was temporarily assigned to Assistant United States Attorney George G. Bashian, Jr. for presentation to a Grand Jury. After interviewing the agents who had arrested Flores, Canas and a third subject Fernando Montane and after carefully weighing all of the evidence against all three subjects and conferring with your deponent and with Assistant United States Attorney Edward John Boyd V, Chief of the Criminal Division, Assistant United States Attorney Bashian determined that in light of Canas refusal to testify against Flores and Montane there was insufficient evidence upon which to indict those two subjects at that time. Therefore on October 10, 1972 Canas was indicted (72 CR 1152) and bail on Flores and Montane was reduced on consent of the Government so that Flores and Montane could be released on bail pending further investigation which Agent Daniocek was instructed to pursue.

(6) Your deponent was periodically kept informed of the progress of Agent Daniocek's investigation which continued through January of 1973. When, in February 1973, it became apparent that no new substantial evidence would be uncovered and that Canas would not be persuaded to testify a decision was made to dismiss the pending complaint against Flores and Montane. This dismissal was effected on February 23, 1973.

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(7) When Agent Daniocek's continuing investigation failed to uncover any further evidence against Flores it was decided in April of 1973 that another attempt should be made to secure the testimony of Canas who by that time had begun to serve his eight year sentence at the Federal Penitentiary at Terre Haute, Indiana. With that purpose in mind Canas was brought from that institution to New York by Writ of Habeas Corpus in April of 1973.

(8) In the latter part of May, 1973 Canas agreed to testify against Flores and was brought to this office in late May or during the first week of June to be interviewed in preparation for his testimony before the Grand Jury. Canas testified on June 19, 1973 and on the same day an indictment was handed up naming as defendants, in addition to Flores, Carlos Hidalgo and Miguel Vera. The latter two were never apprehended although warrants for their arrest were issued on the day the indictment was handed up.

(9) Flores was apprehended on June 28, 1973 and the Government was ready to try him on that date on three days notice in that all witnesses were available and the investigation had long been completed, the only missing element having been Canas' testimony. However the filing of a formal Notice of Readiness was delayed until July 25, 1973 to give agents a reasonable time in which to attempt to apprehend Carlos Hidalgo who, according to intelligence reports, was living in Ecuador but made frequent trips to New York.

(10) The attached chronology is hereby made a part of this affidavit.

3b

Robert L. Clarey
ROBERT L. CLAREY
Assistant U.S. Attorney

Sworn to before me this
10th day of October 1973.

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 21-10015
Qualifying Commission No. 1075
Commission Expires March 30, 1975

CHRONOLOGY

September 28, 1972	Defendant Flores arrested.
September 29, 1972	Defendant Flores arraigned and remanded in lieu of \$150,000 surety.
October 10, 1972	Defendant Flores released on reduced bail of \$20,000 personal recognizance bond. Witness Canas indicted.
October 25, 1972	Witness Canas pled guilty to one count alleging importation of cocaine before the Honorable Joseph C. Zavatt, United States District Judge, Eastern District of New York at Westbury, New York.
January 8, 1973	Canas sentenced to eight years imprisonment (Zavatt J.).
February 23, 1973	Complaint charging defendant Humberto Flores and Fernando Montane dismissed on the Government's motion before Honorable Max Schiffman, United States Magistrate, Eastern District of New York.
June 19, 1973	Defendant Flores indicted together with Carlos Hidalgo and Miguel Vera. Bench Warrants issued for all three.
June 28, 1973	Defendant Flores arrested and arraigned on a bench warrant before Honorable Mark A. Costantino, United States District Judge, remanded in lieu of \$75,000 surety.
July 24, 1973	Government filed formal Notice of Readiness for Trial.
August 6, 1973	Defendant's bail reduced to \$50,000 surety.
September 4, 1973	Defendant Flores motion to have court appoint counsel and proceed in forma pauperis granted.
September 17, 1973	Defendant appears with new counsel Anthony Greco who requests adjournment until October 10, 1973 in order to allow him adequate time to prepare for trial.
October 10, 1973	Case adjourned until October 15, 1973 because trial court actually engaged in another criminal case.

ARGUMENT

The defendant is apparently contending that the instant indictment should be dismissed because the Government did not formally indicate a readiness for trial within six months of defendant's first arrest on September 28, 1972 in contravention of the Eastern District Plan for Achieving Prompt Disposition of Criminal Cases (hereinafter referred to as the Plan).

(1) At the outset, the Government contends that the plan period should begin to run no earlier than June 19, 1973, the date of filing of this indictment and should logically begin to run on June 28, 1973 the defendant having been a fugitive between June 19, 1973 and June 28, 1973.

The period should not begin to run from the date of Flores' initial arrest on September 28, 1973 because the complaint concerning that arrest was dismissed on the Government's motion on February 23, 1973 at which time the defendant was released from any spectre of judicial process. The new indictment is thus to be regarded as an entirely new indictment and arrest within the meaning of Rule 4 of the Plan.

(2) Even assuming the period is deemed to have begun on September 28, 1973 it is clear that the provisions of the plan have no way been violated.

(a) A total of 9 months and 25 days elapsed between September 28, 1972, the date of defendant's initial arrest and July 24, 1973, the date of the filing of the Government's Notice of Readiness. The running of that period should clearly toll between February 23, 1973, the date the complaint was dismissed and June 19, 1973, the date of the filing of this indictment because during that period of 3 months and 26 days, the defendant was completely free of any spectre of judicial process and, had not the Government actively pursued and procured the testimony of a recalcitrant witness, the defendant would never have been indicted. Subtracting this tolling period we are left with a delay of only 5 months and 19 days of which the defendant was confined only 37 days.

~~SECRET~~ 1b

(b) Regardless of whether the time between dismissal of the complaint and the filing of the indictment is tolled it is clear from the facts set out in the foregoing affidavits that the Government is entitled to exceptions under the plan.

(a) It is uncontested that between September 29, 1972 and June 19, 1973 evidence material to the Government's case, namely the testimony of Canas, was unavailable and that both the prosecuting attorney and the case agent exercised more than due diligence to obtain the evidence and did in fact obtain it shortly before June 19, 1973. We are therefore entitled to an exception under Rule 5(c)(i) of the Plan for that entire eight month period.

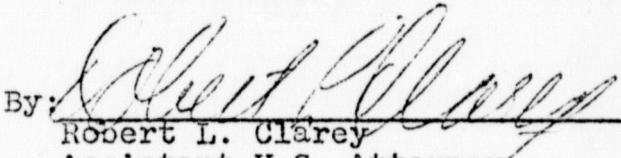
(b) Another exception under Rule 5(d) and (e) is applicable by virtue of the defendant's fugitive status between June 19, 1973 and June 28, 1973 and for the period where the co-defendant Carlos Hidalgo was actively sought by agents from June 19, 1973 until July 24, 1973.

(3) At any rate under no circumstances can it be said on the facts of this case and considering the manner in which the Government has diligently proceeded, that the Government was guilty of any neglect whatsoever let alone the inexcusable neglect proscribed by Rule 4 of the Plan. The defendant's motion to dismiss should therefore be denied.

Respectfully submitted,

ROBERT A. MORSE
United States Attorney
Eastern District of New York

By:


Robert L. Clarey
Assistant U.S. Attorney

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EJB:RLC:mc
F.#733,310

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - X

UNITED STATES OF AMERICA

- against -

HUMBERTO FLORES, ET AL.,

Defendants.

- - - - - X
STATE OF NEW YORK)
COUNTY OF KINGS }

AFFIDAVIT

73 CR 602

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

★ OCT 11 1973 ★

TIME A.M.
P.M.

JOHN DANIOCEK, being duly sworn, deposes and says:

(1) I am a Special Agent of the Drug Enforcement Administration.

(2) On February 25, 1972, Franklin Loqui-Chang was arrested in Miami, Florida for smuggling 2.8 kilos of cocaine. Subsequent investigation by your deponent implicated Carlos Hidalgo and others in the aforementioned violation.

(3) On May 23, 1972 and May 24, 1972, your deponent interviewed Loqui-Chang at the United States Federal Penitentiary, Lewisburg, Pennsylvania, at which time Loqui-Chang willingly agreed to cooperate and testify before a Grand Jury against his associates.

(4) During the course of the interview Loqui-Chang implicated the defendant Humberto Flores, not previously developed through your deponent's investigation.

(5) During the month of June 1971 the entire case was discussed by your deponent and Assistant United States Attorney Robert L. Clarey at which time Mr. Clarey informed your deponent that while the case was potentially prosecutable, it required further investigation in order to solidify its presentation.

(6) On July 6, 1972, Loqui-Cheng testified before a Grand Jury against his associates. At this time no indictments were requested pending further investigation.

(7) On September 28, 1973, Raimundo Canas was arrested at John F. Kennedy International Airport, Queens, New York for

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smuggling 2.2 kilograms of cocaine. At the time of his arrest, Canas stated that he was to be met in the lobby of the Arrivals Building by someone, to whom Canas was to deliver the cocaine. Under the supervision of the arresting officers, Canas went into the lobby of the Arrivals Building in an attempt to make contact. Upon his entering the lobby, two individuals were observed to recognized Canas. They were also observed noticing the surveilling agents and afterwards attempted to avoid contact with Canas. At this time they were detained, and tentatively identified as Humberto Flores and Fernando Montane. Flores and Montane were subsequently arrested by your deponent, without warrant based upon probable cause for conspiring with Canas in the aforementioned violation.

8. The defendant Flores was arraigned on September 29, 1973 for the said violation, however the complaint was subsequently dismissed due to insufficient evidence against the defendant Flores.

9. On September 28, 1973 and again on September 29, 1973 your deponent interviewed Canas in an effort to obtain his cooperation against his co-conspirator Flores, this effort met with negative results. While Canas was willing to tell your deponent of the complicity of the defendant Flores, but he was unwilling to testify against Flores.

10. During the period between the initial arrest of Flores on September 28, 1972 and his subsequent indictment on June 19, 1973 an investigation was conducted by your deponent relative to the suspected complicity of the defendant Flores in the above mentioned violation. The investigation involved telephone and credit checks contact with the then Bureau of Narcotics and Dangerous Drugs relative to their intelligence as to Flores' activities and attempts to cultivate witnesses relative to the circumstances surrounding the arrest of Flores.

11. Your deponent did not interview Canas again until January 1973 when his own judicial proceedings were terminated. At this time Canas again refused to testify against his co-conspirator for fear of endangering his family.

12. Your deponent again interviewed Canas twice during the month of April 1973 in an effort to elicit his cooperation again with negative results. However, in the latter part of May, 1973, Canas voluntarily agreed to cooperate with the Government and testify before a Grand Jury, which he did on June 19, 1973.

John Daniocek

JOHN DANIOCEK, Special Agent
Drug Enforcement Administration

Sworn to before me this
10th day of October 1973.

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-15010
Qualified in Kings County
Commission Expires March 30, 1974

FILED
CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

RECEIVED

OCT 15 1973 *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x-----
THE UNITED STATES

: 73-CR-602

v.

: MEMORANDUM and ORDER

HUMBERTO FLORES

-----x----- OCT 15 1973

Appearances:

Hon. Robert A. Morse, U.S. Attorney, E.D.N.Y., by Robert L. Clarey, Esq., Ass't U.S. Attorney

Anthony G. Greco, Esq., 563 West Market Street, Long Beach, New York, for defendant

COSTANTINO, D.J.

Defendant Humberto Flores moves to dismiss the indictment lodged against him on the ground that the government has violated this district's plan for achieving prompt disposition of criminal cases. The defendant makes no claim that the delay in prosecution has prejudiced him in any way.

The uncontested facts of this case are as follows:

On September 8, 1972, the defendant was arrested pursuant to a complaint filed in the Eastern District of New York. The complaint charged that defendant conspired to unlawfully

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import illicit drugs into the United States. On February 23, 1973, the complaint was dismissed on the government's motion in accordance with Rule 48(a) of the Federal Rules of Criminal Procedure, and the defendant was released from federal custody. Thereafter, on June 19, 1973, an indictment was lodged against the defendant by a grand jury sitting in the Eastern District of New York. The indictment charged, inter alia, that the defendant had illegally imported illicit drugs into the United States and that he had conspired with other named persons to commit that crime. The charges made against defendant Flores encompassed the same set of facts which had precipitated his arrest in the Fall of 1972. The defendant was again arrested on June 28, 1973, and has been incarcerated ever since in lieu of bail of \$75,000 surety bond (reduced on August 6, 1973 to \$50,000 surety bond). On July 24, 1973 the government notified the court that it was ready to proceed to trial.

The defendant argues that under the district's plan the government was required to be ready for trial within six months of his first arrest. He contends that notwithstanding the dismissal of the complaint filed against

him, the period during which he was detained by reason thereof should be included in computing the time within which the government should have been ready for trial.

The defendant's position cannot be sustained. A dismissal pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure is without prejudice. Additionally, there is no provision in the district's plan that provides for inclusion of a period of detention unrelated to the current charges pending against a defendant. Section 4 of the district's plan reads, in pertinent part, as follows:

In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention or filing of a complaint or a formal charge upon which the defendant is to be tried. . .whichever is earliest.

Consequently as to the present indictment the operable period in which the government was obligated to be ready for trial began on June 19, 1973, the day the indictment was filed.

Accordingly the motion to dismiss the indictment is denied.

Mark D. Stark
U. S. D. J.

UNITED STATES DISTRICT COURT
Eastern District of New York

Q
JUL 7 1973 *

United States of America
vs
Rolando Sanchez

No. 72CR1152
TIME A.M.....
Rule 35, F.R.C.P.
Motion for Reduction of
Sentence

The appellant in the above case is respectfully requesting this honorable Court for consideration and relief pursuant to Rule 35 of the Federal Rules of Criminal Procedure.

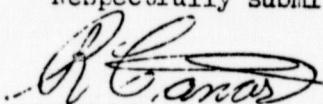
The appellant was sentenced in this Court by the Honorable J.C. Savatt, District Judge, to be incarcerated for a term of eight years after pleading guilty to a violation of Title 21 United States Code, Section 952.

In making this request, I would respectfully submit the following for your consideration:

1. My true name is Raimundo Canas. I am a Cuban exile.
2. This is my only violation of United States law other than when I inadvertently violated U.S. Immigration laws when I first tried to enter your country.
3. I would not have violated your law if it were not for the fact that I was in desperate need of money. I realize that this is no excuse, but in my desperation I did not truly give thought to the consequences of my actions, both to myself and my family and most of all, to the people who would suffer as a result of the narcotics which I attempted to smuggle.
4. I am presently cooperating with the U.S. Attorney's Office, EDNY, in an attempt to rectify my violation.

For the above reasons the appellant respectfully requests that this honorable Court will consider his motion for relief.

Respectfully submitted,


5/4/73
PRO-SE
Raimundo Canas
aka
Rolando Sanchez

Witness:

John Gulanowski
5/4/73

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBER
EJB:RLC:mc
F.#725,203

United States Department of Justice

UNITED STATES ATTORNEY'S OFFICE
EASTERN DISTRICT OF NEW YORK
FEDERAL BUILDING
BROOKLYN, N.Y. 11201

FILED
JUL 7 1973

May 4, 1973 TIME A.M.
P.M.

✓ JUN 4 1973

★ JUL 7 1973 ★
TIME A.M.
P.M.
TIME A.M.
P.M.

Honorable Joseph C. Zavatt
United States District Judge
Eastern District of New York
United States Court House
900 Ellison Avenue
Westbury, New York

Re: United States v. Raimundo Canas,
also known as Rolardo Sanchez
Criminal Docket No. 72 CR 1152

Dear Judge Zavatt:

The above-captioned defendant was sentenced by you on January 8, 1973 to eight years' in prison having pled guilty to smuggling a quantity of cocaine into the United States in violation of Title 21, United States Code, Section 952.

It has come to my attention that the defendant will make a pro se motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure for reduction of that sentence.

In light of the fact that Mr. Canas has recently cooperated with the United States in our case against the principal for whom he was working in the smuggling of cocaine we would join in his application for a reduced sentence.

Mr. Canas is scheduled to appear before a Grand Jury within the next two weeks and his testimony coupled with that of other witnesses will most assuredly result in the indictment of the operator of a major cocaine smuggling ring.

Very truly yours,

ROBERT A. MORSE
United States Attorney

By: Robert L. Clarey

Robert L. Clarey
Assistant U.S. Attorney

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBER

EJB:RLC:mc
F #691,159

United States Department of Justice

UNITED STATES ATTORNEY

EASTERN DISTRICT OF NEW YORK
FEDERAL BUILDING
BROOKLYN, N. Y. 11201

FILED
IN CIVIL SEC'D.
U. S. DIST. OF CIVIL SEC'D. N.Y.

June 27, 1973

★ JUN 29 1973 ★

TIME A.M.

P.M.

Honorable Joseph C. Zavatt
United States District Judge
Eastern District of New York
United States Court House
900 Ellison Avenue
Westbury, New York

Re: United States v. Rolando Sanchez,
also known as Raimundo Canas
Criminal Docket No: 72 CR 1152

Dear Judge Zavatt:

After conferring with Assistant United States
Attorney Robert L. Clarey, I wish to advise you of the
position of this office with regard to Raimundo Canas.

During the past week Canas testified before
our Grand Jury concerning the cocaine smuggling activities
of one Humberto Flores. This testimony together with that
of one Franklin Loqui-Chang has resulted in the indictment
on June 19, 1973 of Flores and two other cocaine smugglers,
Carlos Hidalgo and Miguel Vera. The indictment charges a
conspiracy among the three defendants to bring large
quantities of cocaine from South America to New York between
September 1971 and the present.

Both Canas and Loqui-Chang have agreed to testify
against the three aforementioned individuals at trial.

Chang was arrested at Miami Airport by customs
officials on February 25, 1972 while in the act of smuggling
five pounds of cocaine. He pled guilty before United States
District Judge Merhtens, Southern District of Florida and
was subsequently sentenced by Judge Merhtens to nine years
imprisonment. That sentence was reduced by Judge Merhtens
to three years when Loqui-Chang agreed to cooperate with
this office by testifying against the three defendants
indicted on June 19 1973.

Honorable Joseph C. Zavatt

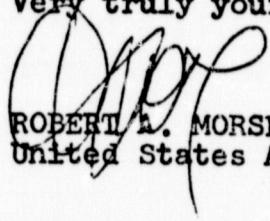
-2-

June 20, 1973

The type of cooperation provided by Canas and Chang is absolutely essential to the successful prosecution of the principal operators of the smuggling ring in question. We therefore recommend that Canas be treated in the same manner as was Loqui-Chang. Specifically, we recommend that Canas pro se motion to reduce his sentence, filed with you on May 7, 1973, be granted to reduce his sentence to 2 or 3 years.

Canas was sentenced by you on January 8, 1973, on his guilty plea, to eight years imprisonment which he is presently serving at the United States Penitentiary, Terre Haute, Indiana.

Very truly yours,


ROBERT H. MORSE
United States Attorney

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

X ★ JUN 29 1973 ★

THE UNITED STATES,

Plaintiff,

- against -

ROLANDO SANCHEZ also known as
Raimundo Canas,

JUN 29 1973
P.M.

AM
DOCKET NO. 72-CR-1152

JUNE 29, 1973

M'FILMED

Defendant. :

X

ZAVATT, D.J.

MEMORANDUM

After the defendant pleaded guilty to Count 2 on October 25, 1972 I sentenced him, on January 8, 1973, to serve a term of 8 years plus 3 years special parole.

Thereupon, the motion of the United States Attorney to dismiss Counts 1 and 3 was granted.

By a memorandum-order dated February 26, 1973, I denied the defendant's motion to reduce or modify said sentence. Thereafter, and on May 4, 1973, the defendant submitted a separate pro se motion for reduction of sentence and advised the court, in that application, that he was cooperating with the office of the United States Attorney for the Eastern District of New York. Today, I

2.

received the letter of the United States Attorney, dated June 27, 1973, recommending that I reduce the said sentence from 8 years to 2 or 3 years.

Since the defendant filed his second application within 120 days of the date when I sentenced him, I hereby reduce the said sentence from 8 years to 3 years, plus a 3 year special parole term. Rule 35, Fed. R. Crim. P.

United States v. Gee, 56 F.R.D. 377 (S.D. Texas 1972)

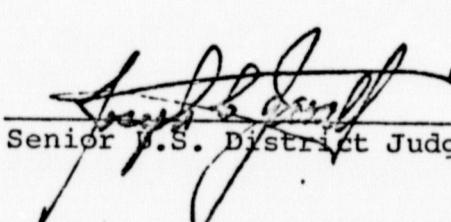
The Clerk is hereby directed to mail a copy of this memorandum-order to the following persons:

Rolando Sanchez, aka
Raimundo Canas
U. S. Penitentiary
Terre Haute, Indiana

Hon. Robert A. Morse
United States Attorney
225 Cadman Plaza East
Brooklyn, New York 11201

Mr. James Haran, Chief
Probation Department
225 Cadman Plaza East
Brooklyn, New York 11201

This is an order.


Senior U.S. District Judge

Certificate of Service

April 11, 1974

I certify that a copy of this brief and appendix has been mailed to the Acting United States Attorney for the Eastern District of New York.

William Epstein

